727(a)(2), (3), (4)
541 (a)(6) : Proceeds from harvest divided pro rata b/w pre + post petition

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Statesboro Division

In the matter of: DANNIS DAVID BRANNEN (Chapter 7 Case 687-00088) Debtor JACKEY DURRENCE Plaintiff v. DANNIS DAVID BRANNEN Defendant	Adversary Proceeding Number 687-0029

FILED
at 9 O'clock & 14 min. A M
Date 4/15/88
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

MEMORANDUM AND ORDER

Jackey Durrence, a judgment creditor, brought this action against Dannis David Brannen so as to move the Court to deny a discharge to the Debtor under Code Section 727(a)(2), (a)(3) and (a)(4). In addition, Durrence seeks to move this Court to request an examination into the acts and conducts of the Debtor by the United States Attorney pursuant to 18 U.S.C. Section 3057. Afer a trial on the merits I make the following

Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) On March 30, 1987, the Debtor filed a Chapter 7 petition (Exhibit P-1). On April 14, 1987, the Debtor filed his Chapter 7 Schedules with the Court. The focus of the controversy which is before the Court rests in large part on alleged inaccuracies in and omissions from the Debtor's schedules. The alleged inaccuracies primarily concern the Debtor's valuation of his interest in an onion crop at the time the petition was filed. There exists a large discrepancy between the value which the Debtor attributed to his interest in the onion crop on Exhibit "A" of Schedule B-3, "Property Not Otherwise Scheduled", and the price which he ultimately received for his crop. The discrepancy between the Debtor's value and the price received is illustrated as follows:

Owner and Acreage of Property Farmed	Schedule B-3 Listed Value	Net Profit Earned By Debtor
Grace Brannen (Debtor's mother) 8 Acres	$500 per acre or $4,000	$3,818.12[1]
Adger Kicklighter 10 Acres	$50 per acre or $500	$13,049.12[2]
Gordon Oliver 15 Acres	$50 per acre or $750	$20,013.74[2]
33 Acres	$5,250	$36,880.98

As the above figures indicate, there is a $31,630.98 discrepancy between what the Debtor listed his onion crop to be valued as of the date of filing his petition, and the actual net proceeds which he became entitled to upon their harvest.

[1] The Debtor indicated that he had a total profit of $3,818.12 after expenses on the onion crop. For purposes of this analysis, I decline to deduct the $3,322.44 in personal expenses and $495.68 in miscellaneous expenses from the $3,818.12 net profit because these collateral expenses are not sufficiently related to the onion crop to warrant inclusion.

[2] These figures represent Debtor's half interest in the total net profit from the Kicklighter and Oliver tracts respectively. By the December 18, 1987, Order of this Court, these funds have been deposited into the Registry account of this Court.

The Debtor planted his onion crop on the various tracts in November 1986, and harvested them in the first two weeks of May 1987. The onions mature in the last thirty days and could not have been sold between March 30th and April 14, 1987. Moreover, on the date the Debtor filed his petition, March 30, 1987, the onions were diseased with botrytis and bacterial softrot. The Debtor is skilled at growing Vidalia onions and experience has taught him that botrytis and bacterial softrot was normal for their stage of growth on March 30, 1987. As of the date of filing his petition, the onion crop was unmatured, and it had no commercial value.

The Debtor had to supply additional post-petition labor and expenses to irrigate, weed, spray, plow, and harvest his crop. The majority of the spraying was done, however, the later part of March and stopped altogether around April 15th or 20th. On the 15 acre Oliver tract between $9,000 and $10,000 in expense was incurred post-petition. No evidence was introduced as to how much expense was incurred post-petition on the 8 acre tract or on the 10 acre Kicklighter tract. No testimony was introduced to quantify the earnings from the Debtor's post-petition services.

2) The Debtor's alleged omissions from his schedules include his interest in: The mobile home where he resides, a John Deere combine which the Debtor uses in his farming operation, a Cloudburst irrigation gun, one-half interest in ten horses, full ownership of one gray mare, and two riding saddles.

In 1985 or 1986 Farmers Home Administration foreclosed on the Debtor's home in Tattnall County. Thereafter, he entered into an informal rent-to-own contract with Ellen Kicklighter, his cousin, which enabled him to live in the mobile home and purchase it from her through the payment of rent. There is no written or other formal evidence of their agreement. In essence, their agreement was that when the Debtor paid her $12,000.00 plus interest the mobile home would be deeded over to him. The Debtor has paid on the average $200.00 per month in rental payments. At the time of trial, he had paid a total of $5,000.00 in rent to his cousin.

The John Deere combine which is in issue was owned by the Debtor until it was repossessed in 1984. At that time, Ellen Kicklighter purchased the combine for $25,000.00 from John Deere in Claxton. The combine was worth $60,000.00 when it

was new and was valued by the Debtor to be between $12,000.00 and $14,000.00 in 1987. The Debtor has an informal lease purchase agreement on the combine and has had it in his possession since it was bought by Ellen Kicklighter. No certain price or time has been set for the purchase of the combine, although the Debtor has already paid $12,000.00 on it.

The Debtor's explanation for his failure to list the mobile home and John Deere combine as an asset on his schedules is that he is renting the assets, there is no agreed upon time certain for the payment in full to be made, and he claims no equity in the assets.

The Debtor also failed to list in his schedules one used Cloudburst irrigation gun and hose which he bought for $1,600.00. The Debtor claims that it was through his inadvertence that he failed to list it. Presently, the irrigation gun works but the irrigation hose has holes in it and the Debtor values the irrigation gun at $300.00.

The Debtor also failed to include one gray mare which is valued at $300.00, one black saddle valued at $45.00 and one old saddle valued by the Debtor at $5.00. Contrary to the Plaintiff's allegations, the Debtor did list his half interest in

ten horses, valued at $1,500.00, on his Schedule B-2.

After this complaint was filed, the Debtor amended his schedules to include his interest in one gray mare, Cloudburst irrigation gun and hose, black saddle and the old saddle. The total value which the Debtor has placed on these assets is $650.00.

3) On December 19, 1986 the deposition of Dannis David Brannen was taken pursuant to notice and subpoena which ordered him to produce documents for the purpose of conducting post judgment discovery. The Debtor did duly appear at the deposition, but failed to bring any records or documents with him. Furthermore, the Debtor did not bring any financial records or title documents with him to the trial.

The Debtor formerly employed Sam Varnedoe as his accountant and apparently had given him his 1984 and 1985 financial records. During the term of Mr. Varnedoe's employment only the 1984 Federal Income Tax Return was filed. Mr. Varnedoe lost his accounting practice before the Debtor's 1985 income tax returns could be completed. Subsequently, Mr. B. Branford Thompson was hired as the Debtor's accountant. Certain records were lost in the changeover from Mr. Varnedoe to Mr. Thompson and

these records are in the process of being reconstructed. The Debtor has been unable to pay Mr. Thompson for the preparation of the 1985 and 1986 returns, but it appears that all relevant financial information has been obtained by the Debtor and turned over to Mr. Thompson as of August 21, 1987 (See Exhibit D-5). The Debtor elected, notwithstanding Plaintiff's allegation that he had failed to keep and preserve such books and records, not to bring any such financial records to trial.

CONCLUSIONS OF LAW

"It is well settled that the statutory right to a discharge in bankruptcy is construed liberally in favor of the debtor and strictly against the objecting party." In re Cycle Accounting Services, 43 B.R. 264, 270 (Bankr. E.D.Tenn. 1984) citing In re Leichter, 197 F.2d 955, 959 (3rd Cir. 1952), cert. denied, 344 U.S. 914 (1953). It is well settled that the discharge provided by Code Section 727 is at the heart of the Code's frest start provisions. In re Chimento, 43 B.R. 401 (Bankr. N.D.Ohio 1984). In a trial on a complaint objecting to a discharge, Bankruptcy Rule 4005 allocates the initial burden of producing evidence and the ultimate burden of persuasion on the plaintiff. But after the plaintiff establishes a prima facie

case, the burden of going forward with evidence shifts to the debtor. In re Chalik, 748 F.2d 616 (11th Cir. 1984); Matter of Reed, 700 F.2d 986 (5th Cir. 1983).

In the case sub judicio the Plaintiff has objected to a discharge on the basis of Code Sections 727(a)(2), (a)(3), and (a)(4). The essence of the Plaintiff's objection under Code Section 727(a)(2) is that the Debtor allegedly concealed from the Plaintiff, a creditor, with the intent to hinder, delay and defraud said creditor the following assets: (1) Cloudburst irrigation gun and hose; (2) Debtor's one-half interest in ten horses and full ownership of one gray mare; (3) Debtor's interest in the proceeds from the sale of an onion crop grown on his mother's eight acre tract, Adger Kicklighter's ten acre tract and Gordon Oliver's sixteen acre tract; (4) Debtor's interest in the mobile home where he resides; (5) the Debtor' interest in a John Deere combine which he uses. The Plaintiff's objection under 727(a)(2) must be denied because the Plaintiff has failed to satisfactorily show this Court that the Debtor acted with the requisite intent to hinder, delay, or defraud the Plaintiff or the Chapter 7 Trustee. Under Code Section 727(a)(2) the intent must be an actual intent which may be inferred from the actions of the debtor. Future Time, Inc. v. Yates, 26 B.R. 1006 (M.D. Ga. 1983), aff'd without op., 712 F.2d 1417 (11th Cir.

1983). The Debtor did, in fact, list in his original schedules his half interest in ten horses at $3,000.00, his interest in eight acres of an unmatured onion crop on his mother's land with a value of $500.00 per acre, his sharecropper interest in the unmatured onion crop on the ten acre Kicklighter tract valued at $50.00 per acre, and his sharecropper interest in the unmatured onion crop on the fifteen acre Oliver tract valued at $50.00 per acre. Admittedly, there is some question as to the value assigned to the unmatured onion crop as of the date the Debtor's petition was filed. Additionally, the Debtor did fail to list the Cloudburst irrigation gun and hose, his full ownership in one gray mare, his interest in the mobile home where he resides, and his interest in the John Deere combine which he uses. However, in light of the totality of the disclosures which the Debtor has made on his schedules, his stated inadvertent failure to list the Cloudburst irrigation gun and hose, and his good faith, although perhaps misplaced, belief that his rental agreements with regard to the mobile home and John Deere combine did not rise to the level of an interest in property, I cannot conclude in this case that the Debtor possessed the requisite intent to hinder, delay or defraud the Plaintiff or a Chapter 7 Trustee.

The substance of the Plaintiff's complaint under Code Section 727(a)(4) is that the Debtor knowingly and

fraudulently made a false oath on his schedules because he failed to list the Cloudburst irrigation gun and hose, ownership of one gray mare, the appropriate value of his interest in the proceeds from the sale of the onion crop on the various tracts, his interest in the mobile home where he resides and his interest in the John Deere combine. It is well established that the veracity of the debtor's statements is critical to the successful administration of the Bankruptcy Code. In re Chalik, supra, 618, citing Diorio v. Kreisler-Borg Construction Company, 407 F.2d 1330 (2nd Cir. 1969). In this case, I am satisfied from the evidence adduced at trial that the Debtor did not knowingly and fraudulently make a false oath or account on his schedules.

The Plaintiff's third objection is that the Defendant failed to keep and preserve books of account or records from which his financial condition and business transactions might be ascertained. It appears from the evidence adduced at trial that the Debtor has kept financial records sufficient for an accountant to prepare his 1984, 1985 and 1986 income tax returns. The necessary financial information is presently in the hands of the Debtor's account, Mr. B. Branford Thompson. The requirement to keep or preserve any recorded information from which the Debtor's financial condition or business transactions might be ascertained depends upon the facts and circumstances in

each case. In re Underhill, 82 F.2d 258 (2nd Cir. 1936), cert.denied, 299 U.S. 546 (1936). The Plaintiff has not persuaded this Court that the Debtor failed to keep or preserve the necessary financial information from which his financial condition or business transactions might be ascertained. It appears that these records are in the hands of the Debtor's accountant and may be obtained by the Plaintiff by use of a subpoena and Rule 2004 examination.

At trial the issue was raised whether and to what extent, the proceeds from the sale of the Debtor's onion crop from the various tracts of land were property of the estate. The filing of the bankruptcy petition creates an estate which is comprised of "all legal or equitable interests the debtor has in property as of the commencement of the case." Code Section 541(a)(1). Clearly the Debtor's interest in the onion crop on the various tracts of land is property of the estate. Under Code Section 541(a)(6) proceeds from the Debtor's interest in the onion crop are property of the estate, "except such as are earnings from services performed by an individual debtor after the commencement of the case."

The Debtor's argument that the onion crop was unmatured at the time the petition was filed and any value it

developed was contingent on subsequent post-petition events is not persuasive. This argument was rejected in In re Ryerson, 30 B.R. 541 (9th B.A.P. 1983), Aff'd 739 F.2d 1423 (9th Cir. 1983), wherein in the Court relied on Segal v. Rochelle, 382 U.S. 375 (1966), for the proposition that a contingent property interest is property of the estate where it is "sufficiently rooted in the pre-bankruptcy past." Ryerson, supra, at 1426. In the case sub judicio, the evidence shows that over 21 weeks out of a total of 28 weeks had elapsed in the growing cycle of the onion crop prior to the Debtor filing his Chapter 7 petition. It is clear that whatever proceeds the Debtor became entitled to were sufficiently rooted in the pre-bankruptcy past so as to become property of the estate, except such as are earnings from services performed after the commencement of the case. Section 541(a)(6). If this were not the case any timely pre-harvest filing by a farmer would result in unwarranted windfall to him, at the expense of creditors who would otherwise be entitled to share in the proceeds attributable to pre-petition earnings.

The critical determination in allocating a total net $36,880.98 in proceeds from the onion crop is deciding how to apportion the proceeds between earnings from pre-petition services and earnings from post-petition services. On the one hand, the Debtor scheduled his regular income available from the

operation of a business or profession as $1,000.00 per month. Facially, it appears that it would be only fair to hold the Debtor to his stated $1,000.00 per month in income. On the other hand, farming is cylical in nature and the proceeds which are derived from it can be attributed to the particular planting, growing, and harvest cycle in which they are earned. The reality of the cyclical nature of farming operations is too strong to ignore. Therefore, I adopt an allocation approach which tracks the planting, growing, and harvesting cycle, rather than the Debtor's scheduled monthly income.

In applying this approach to the case at bar, there was a total of 28 weeks which elapsed between the planting of the onion crop in November of 1986 and the eventual harvest during the first two weeks of May, 1987. The Debtor's March 30, 1987, petition divided the farming cycle into 21 weeks and 3 days pre-petition and 6 weeks 4 days post-petition. Allocating the total net proceeds of $36,880.98 between these two periods results in $28,224.53 being earned pre-petition, and $8,655.19 being earned post-petition.

The evidence adduced at trial indicates that the Debtor has an interest in a John Deere combine which he "rents" from Adger Kicklighter, and in the mobile home where he resides.

The Debtor has paid a total of $12,000.00 towards the purchase of the John Deere combine which has a value between $12,000 and $14,000 and he has paid a total of $5,000 of the $12,000 purchase price on the mobile home. At this time, I decline to request the United States Attorney to examine the acts and conduct of the Debtor. However, the Chapter 7 Trustee is instructed to undertake whatever investigation is necessary to determine the full extent of the Debtor's interest in these properties and to file appropriate actions in this Court to recover any interests to which the estate is entitled.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law IT IS THE ORDER OF THIS COURT:

1) That the Plaintiff's objections to the discharge of Dannis David Brannen are denied;

2) That $28,224.53 out of the net proceeds from the sale of the onion crop constitutes property of the estate;

3) That the Chapter 7 Trustee, William E. Woodrum, Jr., conduct

an appropriate investigation of the Debtor's interest in the mobile home where he resides and the John Deere combine and initiate whatever legal action is justified based on said investigation, to be completed within thirty (30) days from the date of this Order;

4) That the Debtor cooperate fully and expeditiously with any subpoena from the Plaintiff, or other party, which request that he produce his financial records;

5) That the Plaintiff's attorney is entitled to attorney's fees for his efforts in recovering substantial assets for the estate. Said fee will be determined after the filing and due consideration of an application pursuant to Rule 2016, which shall be served on the Trustee.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 14th day of April, 1988.